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IN THE

Supreme Court of the United States

October Term, 1961

No. 849

LINCOLN ROCHESTER TRUST COMPANY, as Administrator, c. t. a., of the Last Will and Testament of ALBERT E. COPELAND, deceased,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

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Opinions Below

The opinion of the District Court (Petition, p. 24) is reported in 188 F. Supp. 839. The opinion of the Court of Appeals (Petition, p. 19) is reported in 297 F. 2d 891.

Jurisdiction

The judgment of the Court of Appeals was dated and entered January 10, 1962. The Petition for a Writ of Certiorari was filed on April 9, 1962. The Brief for the United States in Opposition was filed May 9, 1962, and received by Petitioner

May 11, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Question Presented

What is the nature of the power to appoint the corpus of a decedent's estate that a life tenant must have in order for her interest to qualify for the marital deduction under the provisions of the Estate Tax Law?

Statute and Regulations Involved

One of the critical reasons for this reply brief is that Petitioner and the United States are citing two different Regulations.

The provisions of Section 812 (e)(1)(F) and 811 (f)(3) of the Internal Revenue Code of 1939, as amended to date, are set forth in Appendix B to the Petition (p. 28).

Regulations 105, Section 81.47a, 1949-1 C.B. 195, cited by Petitioner, are contained in Appendix B-3 to the Petition (p. 31).

Regulations 105, Section 81.47a, 1961-1 C.B. 768, cited by the United States are contained in the Appendix to the Brief in Opposition (p. 14).

Statement of the Case

The statement of the case is contained in the Petition (pp. 2-4).

Argument

The argument of the United States in opposition to the Petition can be summarized as follows:

1. Regulation Section 81.47a (c)(7)(ii) has been supported by interpretation of the courts.

2. Congress has approved the interpretation of said Regulation in the legislative history of the Technical Amendments Act of 1958.

3. Under New York law the surviving spouse does not have a power to appoint to herself exercisable in all events.

4. No conflict exists between the Circuits since the *Hoffman* decision was based on the particular facts of that case.

5. It is not proper to look elsewhere in the statute where similar language appears to determine the meaning of that language in a related statutory section.

1. Most significantly the United States and Petitioner agree as stated at page 5 of the Brief in Opposition:

> "The question before the lower courts was whether under Section 812(e)(1)(F) the surviving spouse had the power to appoint the corpus to herself.

Albert E. Copeland died September 26, 1950, and at the time of his death the applicable regulations on this particular point were Regulations 105, Section 81.47a, 1949-1 C.B. 195. These regulations are contained in Appendix B-3 of the Petition at page 31.

The United States has cited as the applicable regulations in this case Regulations 105, Section 81.47a, as amended January 13, 1961, 1961-1 C.B. 768.

No explanation is offered in the Brief in Opposition as to how Regulations promulgated January 13, 1961, are made applicable to determine the estate tax consequences to the estate of a decedent who died on September 26, 1950.

This problem is typical of the difficulties faced by counsel in attempting to arrive at a sound interpretation of the provisions of Section 812 (e)(1)(F). Cases under the 1939 Code were

not argued on the basis of these regulations prior to January 13, 1961. Thus, the issue has been confused and different cases have been argued on different sets of regulations. This has prevented any court from coming to grips with the precise issue presented by this case which is of great importance to lawyers and their clients.

The Government argues (Brief in Opposition, p. 10) that *May's Estate* and the instant case do not rest on the surviving spouse's lack of power to devise unconsumed corpus. However, the Second Circuit in its decision below, 297 F. 2d 891, spoke as follows at page 893:

> "While the widow might consume the principal, she might only do so in good faith, and had no power to dispose of any portion not consumed, by gift or appointment to herself or others, by instrument *inter vivos* or will, disposition of any portion not so consumed being governed by testator's will. We adhere to the ruling in *May's Estate* that this is not a power exercisable *in all events*."

Thus the lower court has said that the widow must have the power (1) to dispose of any portion not consumed by gift, and (2) to dispose of any such portion by will.

A reading of the section 812(e)(1)(F) clearly demonstrates, without resort to extrinsic evidence, that *neither* such power is required. With respect to the power to dispose by gift the language:

> "(* * * whether or not in each case the power is exercisable in favor of others.)"

clearly negates any requirement that the surviving spouse must be able to give the property away. With respect to the power to dispose by will the language:

> "(exercisable in favor of such surviving spouse, *or* of the estate of such surviving spouse, * * *)" (Emphasis supplied.)

clearly negates any requirement that the surviving spouse must be able to dispose of the unconsumed corpus by will.

2. The argument of the United States on the legislative history of the 1958 amendment has two flaws.

(a) It states that Congress in 1958 approved 81.47a (c) (7) of the Regulations as applicable to 1939 Code cases. These Regulations were not promulgated until January 13, 1961.

(b) It states that H.R. 8881 died in the Senate Finance Committee. This fails to take into account that the language of the 1958 Act is identical with the language of H.R. 8881 with the exception of one sentence which has been omitted, that the omission is therefore of prime significance in interpreting the legislation, and therefore that the House Report on that language is also relevant to determine what Congress intended.

3. The United States argues (Brief in Opposition, p. 8):

> "Since New York Law governs the scope of decedent's will, the surviving spouse clearly has no right to appoint the principal to herself; her use and disposition of the principal is limited and not exercisable in all events."

This argument applying New York State law looks to the wrong body of law to determine the meaning of the statutory language of a power to appoint to oneself exercisable in all events under Section 812 (e) (1) (F) of the Internal Revenue Code of 1939.

Petitioner submits that what is required to qualify an interest as a right to appoint to oneself exercisable in all events is a question of interpretation of a Federal statute. Once it has been determined what interest is required to qualify under the terms of the statute, then New York law must be applied with respect to the particular language of the will to deter-

mine if the property interest so created in the surviving spouse meets the requirements set forth by the Federal statute. This too has been an area of great confusion in the opinions of the lower courts on this question.

4. The argument by the United States that there is no conflict between the circuits because each case turns on the construction of the particular will under applicable local law is subject to the criticism noted in 3 above. Petitioner submits that where the language of the will is virtually the same and is similarly construed by the state courts under laws that are similar, the difference in result can only be based on a different interpretation of the requirements of the Federal statute.

5. The argument raised in prior cases on the relationship between the power of appointment section, 811 (f)(3) of the 1939 Code, and the marital deduction section, 812 (e)(1)(F) of the 1939 Code, was that since the property will be taxable in the survivor's estate under the provisions of 811 (f) (3), it therefore should be allowed as a marital deduction under the provisions of 812 (e)(1)(F). This is the argument with which the cases cited by the United States (Brief in Opposition, p. 10) have been concerned.

Petitioner believes that this is a sound argument based on the Committee reports accompanying the 1948 change in the law, 1948-1 C.B. 285, 342, which stated:

> "This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse."

However, Petitioner did not make this argument. Petitioner's argument is that one place to find the meaning of the language "power to appoint" in the Internal Revenue Code is to look

where this language has been used elsewhere in the Code. Section 811 (f)(3) is one such provision and there is no sound basis for arguing that in order to determine the meaning of the Federal statute other provisions of that statute cannot also be reviewed where similar language is used.

The United States has pointed out (Brief in Opposition, p. 6) that the 1958 Act was intended to conform the 1939 Code to the more liberal provisions of the corresponding section of the 1954 Code. The Regulations under the 1954 Code, however, are much more restrictive than those under the 1939 Code and in spite of this Congressional intent to liberalize the Code, the United States now seeks to apply the more restrictive provisions of the 1954 Code Regulations to the 1939 Code sections.

CONCLUSION

For the foregoing reasons and the reasons contained in the Petition for a Writ of Certiorari it is submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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